

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2016-CR

Cir. Ct. No. 2011CF4008

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMONTA LAMAR HAMBRIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Demonta Hambright appeals a judgment convicting him of two counts of intimidating a witness, his wife. The jury acquitted him of three other counts, including sexual assault of his wife. Hambright contends the circuit court's comments at sentencing exhibited bias that

should have resulted in the judge recusing herself, and the court relied on an improper factor during sentencing by refusing to accept the jury's acquittal on the sexual assault charge. We reject those arguments and affirm the judgment.

BACKGROUND

¶2 At the sentencing hearing, the State focused on Hambright's nine previous charges of domestic violence that resulted in dismissal after the victims failed to make court appearances. Citing *State v. Prineas*, 2009 WI App 28, 316 Wis. 2d 414, 766 N.W.2d 206, the State urged the court to consider uncharged and unproven offenses, including the sexual assault for which Hambright was acquitted. Hambright's counsel characterized the victim as a liar and a manipulator, and criticized the State's request to have the court consider the alleged sexual assault as a "back-door way to try to get the Court to punish [his] client for what the State couldn't prove in the first place." The court made the following comments regarding the sexual assault charge:

As I said before, I took notes, and what Mr. Hambright did start out with was significantly more than what the jury found him guilty of. The other case was all not guilty verdicts, but I did get to hear all about that information, and I certainly can take into account what I heard as far as Mr. Hambright's character goes despite the jury's verdict.

I think the case law is clear on that. I have a lot of information here about this relationship, and the information really that I heard, the things that I heard on the witness stand by [the victim] and the history of this relationship and actually the allegations that led to those other charges that the jury found Mr. Hambright not guilty of, in combination with all these letters and in combination with the pictures and her letters, this is a really I will say for lack of a better word, messed-up relationship, but I will say that it—it does fit within the domestic violence framework of my understanding and of—

In reading this it fits within any understanding of—of how these relationships work. It is something that is hard

to understand. I think it was hard for the jury to understand. I think that's why they found Mr. Hambright not guilty of these other charges including the sexual assault.

....

I will, though, look at all this other stuff, and it is a relationship of power and control. Mr. Hambright, you clearly have control. You have control over [the victim]. You've had control over her. You have had it even while you're in jail, and that's really clear by these letters, and it's clear by the way she acted.

It's clear from all of this. I believed her about the sexual assault, what she testified to on the stand that she was sexually assaulted by you.

I believe that on that day you—you told her you are my wife and we're doing this even though she said no, and I believe that, based on all that I know about this relationship, everything I've heard, everything I've read, everything I've seen. I understand why the jury found you not guilty. She—it was—they I believe looked at her letters to you. They don't necessarily understand the dynamic and her description of some of these things like the—how—how you were bleeding, how she yanked on your testicles. I mean, I think she did it to try to get you off of her, and the way she made it sound during the trial wasn't quite that, but I—I really do believe that this was a sexual assault of your wife because you believe that you can sexually assault your wife because she's your property.

I think reading these letters it is so clear the scriptures you cite, the ways in which you're telling her that she's subservient to you and the way you put her down and the way you tell her what she has to do I think states -- it's really clear, and I—I—

As I said before, I truly believe that you sexually assaulted her. She reported it afterwards. I don't see any incentive for something like that, and then she was stuck because she had reported it and it was a serious crime, and then what followed was all your letters.

....

... I believe that on this day you sexually assaulted her and she—That's why she called the police, but let's just say I put aside that even and I focus just on—I think I can

consider all of it for purposes of your character, but even if I just focus on these letters, this is a terrible attempt and—and a success to some extent because it took arrest[] ... getting her here.

....

You know, even if it's not proof beyond a reasonable doubt, I think there was a lot of—a lot of this type of behavior going on certainly before these—this case with all these other charges involving her and then I believe your conduct in this case as well.

....

... I believe that most of her testimony, if not all on the stand, was truthful, but there's been all this letters and of these back and forth, and—and the tattooing and all this lovefelt and this dropping of the divorce and the care that -- and love that [the victim] feels for you and I get that that's part of what this whole picture is. I get—

¶3 At that point, Hambright's counsel asked the judge to recuse herself, arguing that the court's comments went too far toward disregarding the jury's verdict. The court responded that the sexual assault allegation went to Hambright's character. The court continued:

I can take out the sexual assault easily and sentence Mr. Hambright on his character, of all of these contacts up until now, on his convictions, on the fact that he was on extended supervision and on all of these letters that he wrote and really confine it to that. So, if you're asking me to do that, I have no problem doing that because I think the outcome is the same.

¶4 The court then went on to specifically consider the seriousness of the intimidation charges, Hambright's character, the need to protect the public, specific and general deterrence, and Hambright's rehabilitative needs. The court summarized:

So even confining it to the two counts and not even considering the sexual assault part of it at all as far as

character goes, even though I think I can—even if I take that piece out, my sentence remains the same

The court imposed sentences of five years' initial confinement and five years' supervision, consecutive to Hambright's other sentences previously imposed and consecutive to each other. The sentences imposed were substantially less than the maximum sentences requested by the State.

DISCUSSION

¶5 The court's consideration of the sexual assault charge at sentencing does not exhibit bias. A court may consider uncharged and unproven offenses, even offenses for which the defendant has been acquitted. *State v. Leitner*, 2002 WI 77, ¶45, 252 Wis. 2d 449, 646 N.W.2d 341. There is a well-recognized distinction between the fact-finder's function at the guilt stage, where the question is whether the State has proved guilt beyond a reasonable doubt, and the sentencing judge's role, which is to assess the defendant's character using all available information. *Prineas*, 316 Wis. 2d 414, ¶28. Here, the court also noted it had substantial information that was not presented to the jury. The court's comments did not reject the jury's verdict. Rather, the court appropriately considered all of the information it had regarding the incident and determined that, even though the State failed to prove the sexual assault beyond a reasonable doubt, Hambright's actions reflected badly on his character.

¶6 Hambright cites *Brozovich v. State*, 69 Wis. 2d 653, 661, 230 N.W.2d 639 (1975), for the proposition that "knowledge of pending charges does not vitiate the sentence where the trial court did not express its opinion as to the guilt or innocence of the defendant in the pending case or rely on the pending charges in order to impose an increased penalty." In *Brozovich*, the sentencing

court was informed of other pending charges, but did not explicitly consider them when it imposed sentence. The language Hambright quotes from *Brozovich* draws a distinction between the court's knowledge of pending charges and its use of those charges when imposing sentence. Hambright fails to note the very next sentence: "Furthermore, even if the trial court took the pending charges into consideration in imposing sentence, under the decisions of this court it was entitled to do so."

¶7 Hambright describes as "disingenuous" the sentencing court's statement that the sentence would be the same even if the court confined its consideration to the two intimidation charges without considering the sexual assault as a factor relating to Hambright's character. We see nothing in the record that supports that characterization, and no error or appearance of bias in the court's consideration of the sexual assault allegation.

¶8 Hambright also contends his conduct throughout the proceedings "cast the die for the trial court's bias at sentencing." He refers to Hambright's "quarreling" with the judge about his standing to challenge the admissibility of evidence, his accusing the judge of bias, and accusing the judge of favoritism for agreeing to everything the prosecutor wanted. However, Hambright does not show anything in the record to establish the judge's bias or appearance of bias in the court's responses to Hambright's conduct.

¶9 Hambright contends his sentences were "way too steep" for his conduct. He describes his crimes as mere technicalities and contends his intimidation did not include any threats of physical violence against his wife. The sentencing court's rejection of these attempts to minimize the seriousness of Hambright's crimes does not constitute bias.

¶10 For the same reasons, Hambright has not shown that the sentencing court considered an impermissible factor in imposing sentence. Contrary to Hambright's argument, acquittal on the sexual assault charge does not mean that no sexual assault occurred. It merely means that the jury did not find proof beyond a reasonable doubt, which is not necessary when considering a factor relating to the defendant's character. *See State v. Bobbitt*, 178 Wis. 2d 11, 17, 503 N.W.2d 11 (Ct. App. 1973). The court could properly consider information presented at sentencing that was not presented to the jury. That evidence includes a long history of domestic abuse charges that were dismissed when the victim, in several cases Hambright's wife, failed to make court appearances. In addition, the record provides no reason for this court to discount the sentencing court's statement that the sentence would be the same if the court confined its consideration to the two crimes for which Hambright was convicted in this case.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

